CONCEPTUALISING LAW REFORM REFERENCES

AUSTRALASIAN LAW REFORM AGENCIES CONFERENCE 2016

MELBOURNE LAW SCHOOL

2–4 MARCH 2016

PROFESSOR ROSALIND CROUCHER AM[*]

PRESIDENT, AUSTRALIAN LAW REFORM COMMISSION

Abstract: Drawing on the experience of three recent references on which she was Lead Commissioner, Professor Croucher will explore the challenge of big picture conceptual references, such as the ALRC's Inquiry into Commonwealth laws that unjustifiably encroach on traditional rights, freedoms and privileges, but also the need that more confined 'black letter' legal references also have a strong conceptual framework, such as in the recent Age Barriers and Disability references.

ACKNOWLEDGMENT

Reflecting our commitment in our Reconciliation Action Plan, as the head of a government agency—and personally, I acknowledge the traditional custodians of this land, the Kulin nation, who must have scanned the horizon over many centuries past. On behalf of the ALRC I do so this morning, and pay my respect to elders past and present and welcome any Indigenous attendees today.

I would also like to thank our ALRAC hosts, the Victorian Law Reform Commission and its very esteemed Chair, the Hon Philip Cummins AM, who shares this session with me today.

REFLECTIONS

What a rich feast on law reform we have been sharing over the past two days!

Before beginning on the topic for discussion, and in light of our conversations so far, I want to commence with a comment about metaphors. I disagree with the contrast between a so-called 'Rolls Royce' model and a 'Model T Ford' one, if this is to describe differing law reform agencies. It is beguiling, but wrong. We all seem to share a commitment to consultation as being central to what we do. We all seem to be 'half full' people, in having an optimism despite the increasing budgetary constraints under which we operate. We all

---

[*] My Professorial title belongs to Macquarie University. Previously on leave from the University I am now an Adjunct Professor. I am grateful to ALRC Executive Director, Sabina Wynn and Legal Officer, Dr Julie McKenzie, for comments on an earlier draft of this paper.

respond to this by innovation in whatever ways we can. In the case of the ALRC, for example, we had to meet a budget cut of 25% from 2010. We had to refocus our work and strategies, with considerable reflection and innovation. Technology was our friend. We received a Gov 2.0 Taskforce grant for innovation in the use of online technology, supporting a closed online forum in our landmark family violence inquiry in 2009–2010. We use as much free or cheap 'stuff' as we can: open source software, podcasts, enewsletters, social media, our online archive for our 40th anniversary. We release our reports as 'epubs' so they can be read on mobile phones and tablets. Our work (led by communications manager Marie-Claire Muir), was recognised in our being a finalist in the Excellence in E-Government awards in 2015, for the online 'wiki' we developed for crowd sourcing contributions in our Freedoms inquiry. We also embarked on a period of reflection on our writing, focusing on communication: who was the audience we were trying to reach with each document? This led me to include Summary Reports with each final report, to ensure our message was readily digestible. (My simple rule was that they should be capable of being read on the plane between Sydney and Canberra).

So, about the metaphor. It doesn't work. What we do have is a 'gold standard', which is a full-time complement of staff, even on a rolling basis. (I expand upon this theme in the review essay I wrote for *Legal Studies*. This piece grew out of a book review of a collection of essays, *Reforming Law Reform*, that arose from a law reform conference held in Hong Kong).[1]

And now back to the topic of this session!

INTRODUCTION

Our session has a question embedded: 'Big picture' conceptual references—how appropriate for law reform agencies? Some quick answers: first, for those like the ALRC who work under Terms of Reference, it is not for us to say whether we receive such a reference, although we may have input into their shape. Secondly, can we manage? Yes. The ALRC has had many references over the past almost ten years that may be described as broadly of a social justice kind. But, in scoping the Terms of Reference and designing the methodology and consultation strategies to meet them, we have to 'cut our cloak to suit our cloth'. For most of us, and this includes the ALRC, the 'cloth' has contracted and it is a question of managing to do what we can with, not how much we have, but rather how little.

In putting forward my abstract for ALRAC 2016, I had in mind the question: 'How *do* you go about law reform?' The *process* by which the conclusions are reached is well and truly tried and tested. It is set out neatly on our website, including in Easy English, Auslan and 20 other community languages.[2] The three-stage process—of Issues Paper, Discussion Paper and Report—together with the commitment to consultation, drawing in expertise through Advisory Committees and submissions, and the hard yards of initial research, are our established *modus operandi*. We have tried different models, for example having only one consultation paper, which we tested in two inquiries. Frankly, it didn't work. Quite simply, stakeholders felt shortchanged. And where our mantra, our *raison d'être* is based on community engagement, if your stakeholders feel they are shortchanged, it undermines that maintenance of goodwill that is essential for your future-proofing as a law reform body.

---

1 Rosalind Croucher, 'Defending independence' (2014) 34(3) *Legal Studies* 515.

2 http://www.alrc.gov.au/law-reform-process.

We have our own particular 'template' at the ALRC and use it to project manage each reference we receive according to the date for completion stipulated in the Terms of Reference set by each Attorney General. So well-oiled is this template from our experiences, in now over 40 years of law reform, that we can plan, virtually to the day, all the steps in the process to reach completion of the report on its appointed due date. But what I had in mind in this presentation today was not to talk about these aspects of 'doing' law reform, but rather a kind of 'getting into the head-space' of law reform. How do you *imagine* it?

Law reform writing is a particular form of policy work, the conclusions being expressed as recommendations for reform. It is not the same thing as public policy writing—it is about *law* after all—but there are elements in common. Terms of Reference are also often an expression of a particular policy objective, usually contained in the preamble words of the Terms of Reference themselves. So in working out what is required for a particular project—scoping the Terms of Reference—one needs to know the public policy context. As the Law Commission of England and Wales observed in a 2011 report, 'law reform must operate within the broader context of Government policy'.[3]

A key aspect of any report writing, as indeed any extended research writing, is identifying the essential framework of ideas that will be the basis of all developed thinking for the report. This is the fundamental process of conceptual framing. Whether the inquiry is a 'black letter' one, or more of a social justice kind, it requires this kind of framing. This is the key aspect of 'getting into the headspace' of law reform.

Academics are very used to this process and it is part of the drilling of doctoral students in their early days of their research programs. It is also there in law reform writing. Sometimes it is explicit, sometimes more woven into the fabric of the work.

It can be approached in a number of ways.

I will describe the process broadly and then illustrate the discussion through its application in a number of ALRC inquiries. It also contains a bit of a personal journey.

CONCEPTUAL FRAMING

'All pieces of legal writing have an underlying conceptual framework, whether the person realises it or not.' This was said by Professor Bryan Horrigan, now Dean of Law at Monash University, in a wonderfully witty primer on legal research, called 'Horror's Hints'. 'SO', he continued, 'whether you articulate it or not, your writing both reflects and is shaped by some underlying theories about the nature of law and legal argument, on one hand, and how your particular area of study works, on the other'.[4]

The conceptual framework of academic writing involves understanding, and interrogating, different theoretical perspectives, and anchoring the argument of the piece within an appropriately justified critical approach—what Bryan referred to as 'justification, justification, justification'.[5]

---

3 The Law Commission, *Adult Social Care*, Law Com No 326, 2011, [1.14].

4 *Horror's Hints* (QUT, 2000), 3: Hint #2, 'Pardon Me, Your Conceptual Framework is Showing (And check in your intellectual baggage at the desk)'. He developed this theme in *Adventures in Law and Justice* (UNSW Press, 2003), 89–97.

5 *Horror's Hints*, Hint # 10, 17.

Law reform writing, too, must 'own' a conceptual framework. We generally speak in terms of 'principles', or 'rationale', but the idea is the same: that conclusions must be developed and tested against a conceptual framework which is explained, anchored in appropriate literature or research, and justified; and which is then used as the basis of evaluation of the ideas that eventually translate their way into recommendations for reform. Why is something the way it is (rationale); and why should it change (principles)? Law reform projects also add in the element of 'where to from here?' We can't leave our reflective observations in the air, but have to end up with concrete recommendations for reform.

In the first inquiry that I led at the ALRC, on legal professional privilege and federal investigatory bodies,[6] the conceptual framing was undertaken through the lens of rationales. This was my familiar mode of writing with my academic hat on, where my legal history research was driven by a pursuit of 'why': why was a law like it was—what were the driving forces and reasons for its introduction; what was its expressed purpose (its rationale); and did the law now still reflect and meet those purposes. This litmus test of rationale was one I used in my academic explorations of the introduction of a range of laws and doctrines under a broad property law banner: Torrens title;[7] family provision laws;[8] the doctrine of mutual wills[9]—and so on.

Applying this approach to the topic of legal professional privilege led me to examine the underlying justifications for the doctrine so that rationale could be connected to the contemporary doctrine. But in the law reform context it is more than just an idea of rationale, but a much more open exploration, involving changes in legal, social and policy contexts and how recommendations for reform sit in such a context.

When I led the inquiry into Family Violence in 2009–2010, I wanted to express the idea of rationale through a more explicit and open lens of 'framing principles'. This also had the advantage of providing an easier fit for those who work in the arena of public policy.

PUBLIC POLICY CONTEXT

Governments regularly speak in terms of 'objectives', 'goals' or 'outcomes'. It assists in starting to think in conceptual terms in a law reform project to know what the Government's expressed objective may be in any particular area.

For example, in the Government response to the National Plan produced in 2009 by the National Council to Reduce Violence against Women and their Children, the opening statement was an expression of the government's objective:

---

6 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008).

7 Eg: 'Inspired Law Reform or Quick Fix? *Or*, 'Well, Mr Torrens, what do you reckon now?' A Reflection on Voluntary Transactions and Forgeries in the Torrens System' (2009) 30(2) *Adelaide Law Review* 291–327; '*Delenda est Carthago*! Sir Robert Richard Torrens and his Attack on the Evils of Conveyancing and Dependent land Titles: A Reflection on the Sesquicentenary of the Introduction of his Great Law Reforming Initiative' (2009) 11 (2) *Flinders Journal of Law Reform* 197–262; '150 years of Torrens—Too much, too little, too soon, too late?' (2009) 31 *Australian Bar Review* 245–278, publication of the Forbes Lecture in Legal History for 2008.

8 Eg: 'The *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW): Husband's Power v. Widow's Right' (1991) *Australian Journal of Law and Society* (published 1992) 97–129; 'New Zealand's *Testators' Family Maintenance Act* of 1900—the Stouts, the Women's Movement and Political Compromise' (1990) 7 *Otago Law Review* 202–221; 'The Concept of Moral Duty in the Law of Family Provision—A Gloss or Critical Understanding?' (1999) 5(1) *Australian Journal of Legal History*, 5–28.

9 Eg: 'Mutual wills and *Dufour v Pereira*—contemporary reflections on an old doctrine' (2005) 29 *Melbourne University Law Review* 390–411; 'Contracts to leave property by will and family provision after *Barns v Barns* [2003] HCA 9—orthodoxy or aberration?' (2005) 27(2) *Sydney Law Review* 263–288.

> The Government's goal is to reduce all violence in our communities.[10]

This is very broad, even aspirational, language.

'Outcomes' are the results, consequences or impacts of Government actions.[11] Outcome statements articulate government objectives and therefore express what government wants to achieve—and it is familiar language in public policy documents.

The National Council's National Plan, *Time for Action,* used the language of 'outcome areas' in identifying the six goals that the plan sought to achieve. It also identified seven 'core values': including 'safety', 'community responsibility', 'equality and diversity', 'responsiveness', 'justice', 'durability', and 'knowledge and accountability'.

With each outcome area the plan identified a number of 'key strategies'—25 in total. And under each strategy 'actions' were identified to implement the plan—117 in all. Then, pulling it all together there is a summary of what the plan will 'enable all Australian governments and communities' to do.

One specific 'outcome' of *Time for Action* was the inquiry conducted by the ALRC, with the NSWLRC, looking at the interaction of State and Territory family violence and child protection laws with the *Family Law Act 1975* (Cth) and criminal laws. A second aspect of this very big project was a consideration of sexual assault laws in the family violence context. The giving of Terms of Reference to the ALRC was an implementation of one of the strategies in the National Plan.

This is a very instructive approach and well-recognised by public policy makers. It also has some resonance with strategic planning: to identify a high level outcome (often expressed in the planning context as mission statements); the strategies to get there and the actions required. The 'principled approach' that we speak of is one where the strategies are expressed in terms of values or principles.

We have tried to incorporate elements of this way of approaching the 'signalling' in our reports by setting out framing principles—the key driving ideas behind the recommendations; explaining the methodology; and identifying what will be the outcomes or effect of the report.

For a lawyer this has meant shifting my perspective a little. I had to learn the art of distilling the key objectives for a law reform project and to express them succinctly.

Let's start with the ALRC's work on Family Violence.

FAMILY VIOLENCE INQUIRIES

The ALRC conducted two landmark family violence inquiries.[12] The first, completed in 2010, focused particularly on the interaction between the Commonwealth *Family Law Act 1975* and

---

10 https://www.dss.gov.au/sites/default/files/documents/05_2012/facs_37004_violence_against_women.pdf

11 http://www.finance.gov.au/sites/default/files/outcome-statements-policy-and-approval-process.pdf

12 *Family Violence—A National Legal Response*, ALRC 114, 2010. We also undertook a second inquiry, following this one: *Family Violence and Commonwealth Laws—Improving Legal Frameworks*, ALRC 117, 2011.

state and territory family violence, child protection and criminal laws. The second, completed in 2011, concerned family violence in commonwealth laws, apart from the *Family Law Act*.

We started with the Government's objective 'to reduce all violence in our communities'. We reflected this objective through recommendations for reform of legal frameworks to improve safety for women and children in the context of family violence. So our overall 'objective' matched the Government's objective.

We then identified the principles or policy aims that relevant legal frameworks should express to meet this objective: seamlessness, accessibility, fairness and effectiveness:

(1) ***Seamlessness***—to ensure that the legal framework is as seamless as possible from the point of view of those who engage with it.

(2) ***Accessibility***—to facilitate access to legal and other responses to family violence.

(3) ***Fairness***—to ensure that legal responses to family violence are fair and just, holding those who use family violence accountable for their actions and providing protection to victims.

(4) ***Effectiveness***—to facilitate effective interventions and support in circumstances of family violence.

These were like the core values articulated in *Time for Action*.

We then explained what these principles meant and how they were reflected in the recommendations.

Seamlessness

This was my particular word, being fond of metaphors drawn from the domestic setting. It was somewhat of an umbrella idea to capture the other principles.

The fragmented nature of the family law system in Australia is a consequence of the division of power between the Commonwealth and states and it has a real impact in relation to the capacity of the system to respond to family violence. In 2009, for example, the Family Law Council advised the Australian Government Attorney-General in December 2009 that:

> The reality for a separating family experiencing contentious issues in respect of parenting capacity is that there is no single judicial forum that can provide them with a comprehensive response to address their disputes, particularly where there are underlying issues of family violence and/or child abuse.[13]

We said that the idea of seamlessness may be seen, for example, in terms of:

- recommendations for consistency of definitions;[14]
- recommendations for greater sharing of information and facilitation of pathways between the various services, agencies and courts that are involved in family violence matters;[15]
- training programs, knowledge bases and professional development for all those in the various systems that deal with issues of family violence and child abuse;[16]
- coordination or integration of responses to family violence matters.[17]

---

13 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), [7.2].

14 For example, Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), Recs 1, 5. See also Chs 5–7.

15 For example, Ibid, Recs 4, 12. See also Ch 30.

16 For example, Ibid, Recs 2, 3. See also Ch 31.

17 See Ch 29 for a discussion of integrated responses generally.

We identified 'seamlessness' as a foundational policy principle driving the recommendations for reform contained in the report—to reflect what the system should appear like from the perspective of those who engage with the legal frameworks in which issues of family violence and child abuse arise.

'Seamlessness' reflected what we sought to achieve in our various recommendations, so that people would not fall through cracks.[18]

Accessibility

In the report, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (the Access to Justice Framework), the Access to Justice Taskforce of the Australian Government Attorney-General's Department identified 'accessibility' as a key principle: 'Justice initiatives should reduce the net complexity of the justice system'.[19] It also included the principle of 'efficiency', that 'the justice system should deliver outcomes in the most efficient way possible, noting that the greatest efficiency can often be achieved without resorting to a formal dispute resolution process, including through preventing disputes'.[20]

Given its importance in this key policy document, it was also an important goal for our Terms of Reference about family violence. It was also another way of reflecting the umbrella idea of 'seamlessness'.

Fairness

Time for Action identified, as one key 'outcome' area, that 'responses are just'.[21] The Access to Justice Framework identified two 'access to justice principles': 'appropriateness' and 'equity'.[22] These are similar to the idea of 'fairness' and 'accessibility'. The ideas of being 'fair and just' and 'providing protection' should also include the idea of 'respect', which is also a key outcome in *Time for Action*.[23]

Fairness also reflects human rights principles—in particular, Australia's obligations under international conventions. A key obligation concerns the right to minimum procedural guarantees in the case of criminal charges, especially relevant in the context the part of the report concerning sexual assault. So 'fairness', for us, could cover a number of goals, both objective and subjective: about the system; about the victim and about those accused of using violence.

Effectiveness

This word is a regular feature of policy documents—and it is not surprising. The Access to Justice Framework included 'effectiveness' as one of its key principles:

> The interaction of the various elements of the justice system should be designed to deliver the best outcomes for users. Justice initiatives should be considered from a system-wide perspective rather than on an institutional basis. All elements of the justice

18 See the excellent discussion of the 'gap' problems in the context of family law and child protection by D Higgins and R Kaspiew, '"Mind the gap...": Protecting children in family law cases'. (2008) 22(3) *Australian Journal of Family Law*, 235.

19 Australian Government Attorney-General's Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 8.

20 Ibid, 63.

21 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), Outcome 4.

22 Australian Government Attorney-General's Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 62.

23 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), Outcome 2.

> system should be directed towards the prevention and resolution of disputes, delivering fair and appropriate outcomes, and maintaining and supporting the rule of law.[24]

Time for Action included as a specific outcome that 'systems work together effectively'.[25]

The umbrella concept, 'seamlessness', could be seen to capture this goal, but it was helpful to identify it as a distinct principle, particularly given its place in the Access to Justice Framework.

> Identifying framing principles in this way brings the objectives of the inquiry into the foreground and links the inquiry with the broader context of public policy: the government objectives that motivated the inquiry and how the recommendations that we develop may be seen as reflecting some of this wider policy thinking. As they provide the structure for the whole set of arguments throughout the report it makes it very clear to the reader if they are set out early in the document. Like a thesis, it makes good sense to include this discussion in the first chapters of the documents. In ALRC reports, our second chapter is usually something like: 'Conceptual landscape', 'Framing Principles', or a section of the first chapter including a list of principles.

Expressing things at this high level does not suggest that the conclusions are predetermined. Our guiding mantra is that we start with questions, never answers. We also invite submissions on whether these are the right principles and for comment generally upon them, and others that might guide us. But they do assist in pitching what our recommendations are aimed at achieving.

For lawyers this may also be a somewhat new way of thinking. It may even feel at times like 'stating the obvious'. But it is also refreshing and clarifying to be able to distil what the objectives of the inquiry work should be. It also provides the way to answer the challenge: 'why?'; 'what's the point?' For example, how would 'fairness' be achieved in the recommendations in the family violence inquiry? We can answer this by pointing to recommendations concerning victims; recommendations concerning the respondent/accused; and recommendations concerning accountability. We could also then say that an outcome of the report may be that 'legal responses to family violence are fair and just, holding those who use family violence accountable for their actions and proving protection to victims, but also ensuring the safeguards to accused persons in the criminal justice context'.

It is quite handy when we draw from, and build upon, other sets of principles. It provides a nice policy mesh. The Family Violence inquiry was one example, Discovery was another.

DISCOVERY

The Discovery Inquiry[26] took us back to more of a 'black letter law' focus: looking at the law, practice and management of discovery in federal courts. It was initiated following a recommendation in the Access to Justice Framework and was prompted by concerns about the cost of discovery. It could be seen to be an aspect of advancing policy-making with respect to a particular aspect of the civil justice system. The Access to Justice Principles 'set

24 Australian Government Attorney-General's Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 8.

25 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), Outcome 6.

26 *Managing Discovery—Discovery of Documents in Federal Courts*, ALRC Report 115, 2011.

out the objectives of the Australian civil justice system'[27] and provide a basis for policy-making.

Again, I led this inquiry. In identifying framing principles for this one, we could utilise the five principles proposed in the Access to Justice Framework—accessibility, appropriateness, equity, efficiency and effectiveness. But there were also three specific principles that we identified as being particularly relevant to the inquiry—proportionality, consistency and certainty—and didn't want them just swept into the former, generic, 'access to justice' principles.

Identifying principles in this way is not alien to law reform work in this area. In 1994, for example, the Master of the Rolls in Great Britain, Lord Woolf, conducted an inquiry into options to consolidate the existing rules of civil procedure in England and Wales. His report, in 1996, identified a number of principles which the civil justice system should meet in order to ensure access to justice.

According to Lord Woolf's report, the system should:

(a) be *just* in the results it delivers;

(b) be *fair* in the way it treats litigants;

(c) offer appropriate procedures at a reasonable *cost*;

(d) deal with cases with reasonable *speed*;

(e) be *understandable* to those who use it;

(f) be *responsive* to the needs of those who use it;

(g) provide as much *certainty* as the nature of particular cases allows; and

(h) be *effective*: adequately resourced and organised.[28]

There are considerable similarities of aspiration and principle with the framing principles we settled upon in the Discovery Inquiry and that informed the development of our law reform responses.

A principal challenge for us was to recognise the important role that discovery can play in facilitating the resolution of disputes, while reviewing its operation in the context of the reality of modern information creation and retention and the development of active case management practices. The doctrine has a long history in common law systems and is central to fact-finding and decision-making processes, but there were great concerns about the time involved and the consequent cost in litigation.

The focus of the recommendations was principally on the Federal Court, targeting a key theme in submissions and consultations that, to the extent that there is a problem in relation to discovery of documents in federal courts, it lies principally in the area of practice. Any uncertainty as to what is expected of parties and any inconsistency in case management by judges increases, the potential for litigation to become protracted and costs to balloon.

Our recommendations were based on a model that I described as 'facilitative', emphasising the role of the judge in facilitating the resolution of the matter through active case management to offset what some argue is the problem of the adversarial nature of proceedings—or overly adversarial practice. We concluded that the most effective way to

27 Australian Government Attorney-General's Department, Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 61.

28 Lord Woolf, *Access to Justice: Final Report* (1996), Overview, [1].

facilitate the resolution of disputes in the Federal Court is through robust case management. Such a model preserves the discretion of the judge while, at the same time, introducing greater clarity of expectations in relation to discovery. A key focus of the recommendations is on reinforcing the flexibility that Federal Court judges have in the case management of litigation so that, for example, any discovery regime can be tailored to suit the particular issues in each case.

Some recommendations focused on practice notes, issued by the Chief Justice, as flexible and responsive tools for guiding practice in the Federal Court. Practice notes can set out clearly what the Court expects of practitioners, through which greater consistency of outcome may be achieved. Practice notes for participants are complemented by judicial education and training directed towards reinforcing judicial understanding of powers and encouraging their more consistent application. Recommendations for reform focus on the educative function of practice notes, to bring to the attention of parties—and to encourage the use of—the various ways in which discovery may be managed effectively and efficiently in proceedings. This provides guidance on the best practices of the parties, which may also be a valuable resource for judges in scrutinising applications and submissions. These reforms are also supported by recommendations for legislative amendments—to governing Acts and court rules—that provide statutory powers to facilitate the implementation of other reforms and to drive cultural change.

The Freedoms Inquiry was a different kind of inquiry altogether, and required another approach.

FREEDOMS INQUIRY

In this inquiry we were asked to identify and critically examine Commonwealth laws that encroach upon traditional rights, freedoms and privileges recognised by the common law. What are meant by 'traditional rights, freedoms and privileges' was defined in the Terms of Reference as including a list of things, like freedom of speech, religion, movement and association; client legal privilege and the privilege against self-incrimination; procedural fairness and the principle of a fair trial.

The premise behind the Terms of Reference was that such traditional rights and freedoms should only be encroached upon if appropriately justified. This was, in essence, the grand framing principle of the whole.

The challenge for us was to determine a methodology to manage the tasks given. Each of the rights and freedoms could be seen to embrace numerous potential inquiries, each with their own set of framing principles—and yet we had to discharge our brief across the 19 dotpoints.

Most chapters of the Report are structured to include the following elements with respect to each right, freedom or privilege:

- an analysis of the source and rationale of the right—this probes the conceptual foundations of each right through its historical development in the common law;
- an overview of how the right is protected from statutory encroachment by the Constitution, the principle of legality, and international law;
- a general discussion of how limits on the right might be justified—this involves an analysis of rationale;
- an extensive survey of current Commonwealth laws that may limit the right; and

- a discussion of the justifications for some of these laws, with some laws being identified as possibly unjustified and therefore deserving further review.

We point out that it is widely recognised that there are reasonable limits to most rights. Only a handful of rights are considered to be absolute. Limits on traditional rights are also recognised by the common law, although such limits may be regarded as part of the *scope* of common law rights. But how can it be determined whether a law that limits an important right is justified? Proportionality tests are now the most widely accepted tool for structuring this analysis. They frame how limitations on rights may be tested.

Proportionality is used to test limits on constitutional rights by the High Court and by constitutional courts and law makers around the world. This involves considering whether a given law that limits rights has a legitimate objective and is suitable and necessary to meet that objective, and whether—on balance—the public interest pursued by the law outweighs the harm done to the individual right. The use of proportionality tests suggests that important rights and freedoms should only be interfered with reluctantly—when truly necessary. In the Report, the ALRC often draws upon proportionality analyses when considering whether particular laws that limit rights are justified.

Hence 'proportionality' could be seen to be a second principle: that a limitation on a traditional right or freedom should only be considered justified where:

- it has a legitimate objective;
- it is suitable and necessary to meet that objective; and
- whether, on balance, the public interest pursued by the law outweighs the harm done to the individual right.

The ALRC's approach in this Inquiry was to determine a forward-looking law reform response that met the essential aspects of the Terms of the Reference across its broad range. Hence in many chapters of the Report, laws are identified that may be unjustified and therefore warrant further review.

The highlighted laws were selected following consideration of a number of factors, including whether the law has been criticised for limiting rights in submissions, parliamentary committee reports or other commentary. The fact that a law limits multiple rights has also sometimes suggested the need for further review. Where a law has been identified as being amenable to further review, the conclusion may be that the appropriate action is:

- a review of specific statutes or provisions;
- a review in a coordinated fashion across Commonwealth, state and territory laws;
- consideration as part of existing regular review and monitoring processes; and/or
- a new periodic review.

Thinking about the Report in terms of the framing idea of justification led to a discussion of how laws are scrutinised by committees and others, such as the Independent National Security Legislation Monitor, the Australian Human Rights Commission, and how these processed might be improved.

DISABILITY INQUIRY

The Disability reference started with an approach set out in the Issues Paper that said that, in defining the new policy settings in the form of specific framing principles, assistance may be

derived from both the international and domestic arenas. The ALRC considered that five interlinking principles were strongly evident: dignity; equality; autonomy; inclusion and participation; and accountability.

By the time of the final report, these baseline ideas became transformed into concrete recommendations for 'National Decision-Making Principles', that embodied the inquiry's framing principles.[29]

CONCEPTUAL FRAMING—SOME COMPARISONS

I have done a little sampling across our recent body of law reforming, to see how some of you have gone about your own reforming exercises.

New Zealand

I found the report of the New Zealand Law Commission on *Modernising New Zealand's Extradition and Mutual Assistance Laws*, report 137—hot off the press in February 2016. (Congratulations, Sir Grant Hammond!). This report was aimed at dealing with the problem of people who had committed crimes fleeing the jurisdiction: 'to escape the long arm of the law', as it was put by Sir Grant in the Foreword to the report, a problem made more complex in 'the globalised world in which we live, and the reality that both criminals and their crimes cross our borders'.[30]

Part 1 of the report, 'Background and Conceptual Issues', includes a section, 'The Principles Behind our Review', that support the two draft Bills contained in the report:

(a) The regimes should facilitate and support New Zealand's international obligations, and its role as an international citizen, in prosecuting and preventing crime.
(b) At the same time, the reforms as a whole should promote procedural fairness and protection of the rights of individuals who are the subject of extradition or mutual assistance requests.
(c) Purely technical or procedural impediments to achieving (a) and (b) should be minimized in favour of substantive opportunities to provide assistance while at the same time protecting the rights of those being extradited or investigated.[31]

These could also be expressed with one-word labels as: 'consistency'; 'fairness'; 'effectiveness' and 'efficiency'.

Samoa

Exploring further in the Pacific we come to Samoa.

In July 2013 the Samoa Law Reform Commission produced its final report on the *Districts Court Act 1969*.

'Accessibility', 'fairness' and 'efficiency' can be seen as key principles, or rationales, as follows:

---

29 *Equality, Capacity and Disability in Commonwealth Laws*, ALRC 124, 2014. See especially Ch 3.
30 NZLC, *Modernising New Zealand's Extradition and Mutual Assistance Laws*, Report 137, 2016, [1.2].
31 Ibid, [1.4].

> The primary reason for the review of the District Courts Act is so that justice is readily **accessible** to the general public, acting alone within the court system or through legal practitioners. Those dispensing justice must also be provided with systems and rules that are **simple and fair**.[32]
>
> …
>
> The key principle guiding the recommendations for reform in this Report is **access to justice**, which seeks to ensure that every person in Samoa can access the courts and receive a fair hearing. The omission considers that access to justice is served by simplifying the rules and procedures of the Courts and finding ways to allow Judges, Registrars, court officials, litigants and practitioner to fairly and **efficiently** perform their roles in the justice system.[33]

CONCLUSIONS

The illustrations I have used show how we as law reformers deploy a conceptual framework. Sometimes we call it by different names: rationales; principles; themes. But, as Professor Horrigan said, 'All pieces of legal writing have an underlying conceptual framework, whether the person realises it or not'.

As we are in the business of writing policy documents, to advance changes to law in specific ways; and as we are writing to a particular government audience, it makes sense to express our conceptual framework in a way that is readily recognisable from a public policy maker's perspective. It sets out clearly the reasons we are making our recommendations and the way in which we have cast them.

In some of the earlier reports the conceptual framework was not necessarily set out as a capstone list of broad principles, but as specific anchoring ideas. But these could also be rephrased in terms of principles.

For example, in the report, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, chapter 3, 'Open Government', begins:

> [3.1] It is a central tent of representative democracies that the government is open to account for its actions. A key part of this accountability is public access to the information on which action and policies are based.

This could also be expressed as 'accountability' and 'accessibility'.

Similarly with the privilege report, the conclusion we reached was that the maintenance of the doctrine of legal professional privilege was justified as an important aspect of the right to a fair hearing and served the effective administration of justice. We could also have included, in terms of framing principles, things like 'effectiveness'.

The power of using framing principles is the clarity for the public policy reader. If there is also a clearly stated government objective, the legal policy work can be identified as fitting within that broader context. We are in the business of communicating, after all, and the clearer our communication for our particular audiences, the more readily it is likely to be understood and its implementation properly assessed.

As law reformers (like doctoral students) we must always be driven by, and able to respond to, the question: 'why?'

---

[32] SLRC, *District Courts Act 1969*, Final Report 12/13, 2013, [1.8]

[33] Ibid, [1.10]. Emphasis added.

‘Justification, justification, justification’ is the response to ‘why’, ‘why’, why’? And this is grounded in our conceptual framework.